

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IVAN ACHILLES HAWKINS,

Defendant-Appellant.

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UNPUBLISHED

April 21, 2005

No. 253395

Kent Circuit Court

LC No. 03-002117-FH

Before: Fort Hood, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of third-degree home invasion, MCL 750.110a(4); preparation to burn property valued over \$20,000, MCL 750.77(1)(d)(i); and assault with a dangerous weapon, MCL 750.82(1). The trial court sentenced defendant to concurrent terms of four to ten years' imprisonment for the home invasion conviction, four to twenty years' imprisonment for the preparation to burn conviction, and two to eight years' imprisonment for the assault conviction. We affirm but remand for the ministerial task of correcting the judgment of sentence.

**I. Facts**

The trial occurred in November 2003. Aina Clark<sup>1</sup> testified as follows: She and defendant were currently in a romantic relationship but had taken a break from their relationship in the past. On September 23, 2002, she lived at a rental house on Wealthy St. in Grand Rapids with her son, her cousin, and defendant. She saw defendant stumbling in a street<sup>2</sup> on September 23, 2002, and she and defendant subsequently engaged in some "arguing and tussling," during which she sustained a cut on her face. The cut occurred because "I had my keys in my hand, and I was tussling with him[.]" Their "tussling" took place because defendant accused her of cheating. Defendant wanted to retrieve his belongings from the rental house, but Clark told him that he could not do so. He had a key to the house and knew the number for deactivating the

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<sup>1</sup> Because Aina Clark was a reluctant witness for the prosecution, her testimony was disjointed and unclear in places.

<sup>2</sup> Clark did not specify on which street she saw defendant.

security system. She returned to the home to find defendant there, an argument ensued, and defendant began throwing things. He broke a stereo, and he eventually departed from the premises.

Clark admitted that she did not want to testify against defendant, and the court granted the prosecutor permission to question Clark as a hostile witness. Clark admitted that she spoke with the police after she and defendant “tussled” and argued on September 23, 2002, and that, at that time, she told them that defendant was not living at the home and that he had no permission to be in the home. Clark admitted that she told the police that defendant hit her with a compact disc (CD) player or case. She stated, “I probably did,” when asked if she told the police that defendant had assaulted her. On cross-examination, she stated that she lied to the police because she had been mad at defendant at the time she spoke with them.

Clark testified that, after defendant left and after the police left on the evening of September 23, 2002, her son went to his bedroom and she went to her bedroom. The police then returned to her home, and she spoke with some police officers around 3:00 a.m. She claimed that she could not remember why the police returned to the home or what she told them. She later stated that she saw defendant outside her home at some point during the night and called her mother, after which her mother stated that she was going to call the police.

Clark further testified that (1) she smelled a strong scent of gasoline while in her bathroom at some point during the night; (2) she went outside the house, while still smelling gasoline, and saw defendant by some type of fire; (3) defendant then “spark[ed] up [a] lighter;” (4) defendant tried to hit her with a shovel; and (5) defendant stated that he was going to kill her. Clark stated that she left to stay at a friend’s house and that her mother subsequently called her and told her that the rental house had been “burnt up.” She stated that the gasoline smell was not emanating from her vehicle.

Clark admitted that, a few days after the fire, she wrote a statement for the police in which she stated that (1) defendant said “I’m going to blow this house up” on the night in question, (2) her mother called the police when she learned of this threat, and (3) she (Clark) smelled gasoline and then saw defendant light a piece of paper and threaten to kill her. When the prosecutor asked, “Are you telling us that’s not what happened[?],” Clark stated, “I’m saying a lot of the stuff I wrote down, that I remember, some of it is true.”

Pablo Martinez, a fire investigator with the Grand Rapids Fire Department, testified as follows: The fire originated on the floor of the back porch of the house. His investigation of the scene led him to believe that an accelerant had been used to start the fire, and his trained, accelerant-sniffing dog affirmed this conclusion. The dog indicated that an accelerant had been present on the back porch and had also been spread “[i]n front of the windows along the east side of the house and along the west side of the house and also on a mat that was sitting on [sic] the front door[.]” After defendant’s clothing and shoes were seized, the dog indicated that an

accelerant was also present on defendant's shoes. Laboratory analyses confirmed the presence of gasoline outside the house, although not on defendant's shoes.<sup>3</sup>

Tonja Garth testified that she lived in a house directly behind the house that burned. She stated that she kept a can of gas in a shed and that the shed was accessible to anybody. Delmonteon Garth, Tonja's son, testified that, the day after the fire, he was planning to use the gas in his lawnmower and noticed that half of the gas was gone from the can and that the cover was missing. Delmonteon testified that his family's shed was visible from Wealthy Street.

Case Weston, a Grand Rapids police officer, testified about Aina Clark's statements to him on the night of the fire. The court allowed the statements to be admitted as excited utterances. According to Weston, Clark stated, in part, that defendant (1) had "gone crazy" and "tore up her house," (2) hit her with a plastic CD case, (3) threw a video cassette recorder through a window of the house, (3) did not live in the house and had never lived there, and (4) had no permission to be inside the house.

Jason Nemecek, another Grand Rapids police officer, testified that he responded to the scene on the night in question and took pictures of a broken window on the house and "a broken speaker box . . . laying on the sidewalk." Nick Calati, another Grand Rapids police officer, testified about Clark's statements to him on the night of the fire. The court, once again, allowed the statements to be admitted as excited utterances. According to Calati, Clark stated that defendant (1) came to her window during the night, set a piece of paper on fire, and indicated that he was going to "blow . . . her up;" and (2) proceeded to threaten her with a shovel.

An audiotape of an interview of defendant conducted by Detective James Jorgensen of the Grand Rapids Police Department was played to the jury, but a transcript of the tape was not provided on appeal. Given the subsequent questioning of Jorgensen by defense counsel, it appears that defendant, during the interview, denied setting the fire in question.

The jurors convicted defendant of third-degree home invasion, preparation to burn property valued over \$20,000, and assault with a dangerous weapon. They acquitted him with respect to the additional charge of arson of a dwelling house.

## II. Sufficiency of the Evidence

On appeal, defendant first argues that the prosecutor presented insufficient evidence to convict with regard to the charges of home invasion and preparation to burn. This Court reviews *de novo* an insufficiency of the evidence claim. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The Court, viewing the evidence in the light most favorable to the prosecutor, must determine whether a rational trier of fact could have found that the prosecutor proved all the elements of the crime beyond a reasonable doubt. *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003). Circumstantial evidence and reasonable inferences drawn

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<sup>3</sup> Martinez testified that experiments have demonstrated that trained dogs can detect the presence of accelerants that are not detectable through laboratory analyses.

therefrom can be sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

A person commits third-degree home invasion if he

[b]reaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor. [MCL 750.110a(4).]

Defendant argues that, under the circumstances of this case, the prosecutor, in order to obtain a conviction for third-degree home invasion, had to prove that defendant had no permission to enter the home in question. Defendant contends that Aina Clark's testimony, as well as additional evidence presented at trial, demonstrated that defendant did in fact have permission to enter the home. Defendant's argument is without merit. Indeed, Officer Weston clearly testified that Clark told him that defendant did not live in the house, had never lived in the house, and had no permission to enter it that night. These statements by Clark were admitted as substantive evidence by the trial court. They provided sufficient evidence that defendant had no permission to enter the home. While contrary evidence was also produced at trial, we must view the evidence in the light most favorable to the prosecutor, and "[t]his Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses." *Bulmer, supra* at 36. Reversal is unwarranted.

A person is guilty of preparation to burn property valued over \$20,000 if he, in pertinent part, "uses, arranges, places, devises, or distributes an inflammable, combustible, or explosive material, liquid, or substance or any device in or near a building or property . . . with intent to willfully and maliciously set fire to or burn the building or property" and if the property includes real property and is valued at \$20,000 or more. See MCL 750.77(1)(d)(i). Defendant argues that the prosecutor presented insufficient evidence of this crime because there was no evidence that defendant placed a flammable liquid at the home. Defendant's argument is without merit.

First, Aina Clark testified that she smelled gas around her home about the same time that she saw defendant near the home by some type of fire. Moreover, Pablo Martinez testified that an accelerant had been used to burn the home, and Martinez's accelerant-sniffing dog sensed an accelerant on defendant's shoes. Additionally, Officer Calati testified that Clark told him that defendant came to her window during the night, set a piece of paper on fire, and indicated that he was going to "blow . . . her up." Finally, Clark's neighbor testified that some of his gasoline was missing the day after the fire. This evidence provided a reasonable inference that defendant placed a flammable liquid at the home. As noted earlier, circumstantial evidence and reasonable inferences drawn therefrom can be sufficient to prove the elements of a crime. *Nowack, supra* at 400. Reversal is not warranted.

### III. Prosecutorial Misconduct

Next, defendant argues that the prosecutor committed misconduct requiring reversal in two respects. However, defendant did not object to the prosecutor's alleged instances of misconduct and, therefore, failed to preserve this issue for appeal. "Because the alleged error[s]

w[ere] not preserved by . . . contemporaneous objection[s] and . . . request[s] for . . . curative instruction[s], appellate review is for plain (outcome-determinative) error.” *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). To satisfy the plain error test first set forth in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), a defendant must show that

1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. In addition, defendant must show that the error resulted in the conviction of an actually innocent defendant or that the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . . [*People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004) (internal citations and quotations omitted).]

Defendant first contends that the prosecutor erred in calling two witnesses – Tonja and Delmonteon Garth – who were not named on his witness list. Defendant has not established that he is entitled to relief with respect to this instance of alleged misconduct. Indeed, the late addition of witnesses may be appropriate in certain circumstances. See, generally, *Callon, supra* at 326-329. It is possible that circumstances not apparent from the record justified or excused the late addition of witnesses in this case. Defendant has simply not established that the witnesses were erroneously allowed to testify under improper circumstances. Significantly, the record is devoid of evidence that defendant was *actually* unaware that the witnesses would be called<sup>4</sup> and was unable to prepare adequately for their cross-examination. Moreover, it is not clear from the record *why* the witnesses had not been named on the prosecutor’s witness list. It was defendant’s burden on appeal to establish outcome-determinative plain error, *Kimble, supra* at 312, and defendant has not done so.

Defendant additionally argues that the prosecutor erred by asking Aina Clark if she “[came] down here today with [defendant],” if she “[came] down here yesterday with [defendant],” if she was “supposed to come down here today for the prosecution,” and if she was “supposed to come down here yesterday or not.” In his appellate brief, defendant states:

Was the prosecutor suggesting that Ms. Clark and/or Mr. Hawkins had violated a no-contact order? Was he suggesting that Ms. Clark did not come to court on previous days when she was “supposed” to come? At the very least, the prosecutor communicated to the jury that Ms. Clark had violated some supposed duty that she had to the prosecution by accompanying Mr. Hawkins.

No error requiring reversal is apparent with respect to the prosecutor’s questions. As noted in *People v Schuette*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), a reviewing court must consider claims of prosecutorial misconduct on a case-by-case basis by

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<sup>4</sup> Defendant states in his appellate brief that the prosecutor “did not give notice to . . . defendant *on the record* that [he] would add late witnesses” (emphasis added).

examining the record and evaluating the challenged remarks in context. Viewing the prosecutor's questioning in context, it is apparent that the prosecutor was simply emphasizing that, although Clark was supposed to be a witness for the prosecution, she had been accompanying defendant to court. The prosecutor was attempting to explain why Clark was minimizing the inculpatory evidence against defendant. This explanation was clearly relevant to the trial. No plain error is apparent.

#### IV. Sentencing Credit

Finally, defendant argues that the judgment of sentence erroneously fails to indicate that he is entitled to 220 days of jail credit. We conclude, and the prosecutor admits, that a remand is appropriate so that the judgment of sentence may be amended to reflect the 220 days of credit.

Affirmed but remanded for the ministerial task of amending the judgment of sentence. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Patrick M. Meter

/s/ Bill Schuette